

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9711 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE B.J.SHETHNA

and

HON'BLE MR.JUSTICE SHARAD D.DAVE

- =====
1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

MAYFAIR POLYMERS PVT LTD

Versus

UNION OF INDIA

Appearance:

1. Special Civil Application No. 9711 of 2004
MR PARESH M DAVE for Petitioner No. 1-2
MR JITENDRA MALKAN for Respondent No. 1
DS AFF.NOT FILED (N) for Respondent No. 2-3

CORAM : HON'BLE MR.JUSTICE B.J.SHETHNA

and

HON'BLE MR.JUSTICE SHARAD D.DAVE

Date of decision: 05/10/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE B.J.SHETHNA)

Rule. Learned Standing Counsel Shri Malkan waives

service of Rule for the respondents.

2. Customs, Excise & Service Tax Appellate Tribunal (for short "the Appellate Tribunal"), West Zonal Bench, Mumbai, by its impugned common order dated 19.2.2004 disposed of the Stay Application Nos.1643 & 1644 of 2003 in Appeal No.E/3612 & 3613/03-Mum, whereby the learned Appellate Tribunal condoned the delay of 15 days. The learned Appellate Tribunal also found that the duty of Rs.6,96,985/- and penalty of equivalent amount on the assessee and Rs.7 lacs under Rule 209-A on the Director was the consequence of the alleged recovery of Excise Duty from the buyers of the goods which were not deposited in the Government Treasury which was required to be deposited u/s.11-D of the Central Excise Act, 1944. The learned Appellate Tribunal prima facie observed that if any amount was recovered as excise duty then the same was required to be deposited. However, the learned Appellate Tribunal was of the opinion that mandatory penalty of equivalent amount and penalty under Rule 209-A have to be decided at the time of final hearing of the case. Accordingly, the learned Appellate Tribunal ordered pre-deposit of Rs.6,96,985/- u/s.35-F of the Act and waived further pre-deposit and stayed the recovery thereof on the condition that the compliance of the pre-deposit order be reported to it on 2.4.2004.

3. It is not in dispute that the aforesaid order (Annexure : G) was passed by the Appellate Tribunal on 19.2.2004 after hearing the representative of the petitioner - assessee. Admittedly, there was non-compliance of the impugned order of pre-deposit, passed by the learned Appellate Tribunal at Annexure : G by the petitioner. Instead of complying with the order (Annexure : G) passed by the learned Appellate Tribunal the petitioner submitted an Application No.E/MA (Modification) 702/04 in the Appeal, which was placed for hearing before the Appellate Tribunal on 6.5.2004. At the time of hearing the consultant of the petitioner and the representative of the Department were present. It was submitted by the representative of the Department that inspite of several extension granted the petitioner had failed to make pre-deposit of Rs.6,96,985/- as ordered on 19.2.2004, by the Appellate Tribunal, therefore, it was submitted that their Appeal be dismissed for non-compliance u/s.35-F of the Act. Having heard both the sides and having perused the record the learned Appellate Tribunal by its impugned order dated 6.5.2004 (Annexure : J) dismissed the Appeal of the petitioner for non-compliance of pre-deposit order u/s.35-F of the Act and also the modification

Application. It also appears from the record of this petition that thereafter an Application dated 6.7.2004 (Annexure : K) was submitted by the petitioner to the Assistant Registrar of the learned Appellate Tribunal, making several grievances in it. Thereafter, the Superintendent, Central Excise, AR Himatnagar, called upon the petitioner to make the payment of duty, penalty and interested indicated in the order in original within 2 days from the date of receipt thereof, failing which the petitioner was threatened with coercive measures (Annexure : L). Hence, this petition.

4. In response to the notice issued by this Court, Reply Affidavit is filed by the other side contending that the petition be dismissed for suppression of material fact, namely, the order of attachment dated 5.8.2004, passed by the Assistant Commissioner, Central Excise, Gandhinagar, u/s.11 of the Act, attaching the excisable goods worth Rs.21,01,204/-. It was also contended in Para : 12 of the Reply that the petitioner was given more than enough time to deposit the amount as directed by the Tribunal.

5. At the out-set it may be stated that the learned Counsel Shri Paresh Dave for the petitioner submitted that inspite of several orders passed by the Commissioner and the Commissioner (Appeals), the Commissioner (Appeals) in this case, dismissed the Appeal on merit, therefore, the petitioner was compelled to approach the Appellate Tribunal in Appeal along with Stay Application. He submitted that even the Commissioner (Appeals) had waived pre-deposit in his Stay Application. Therefore, the learned Appellate Tribunal ought to have completely waived the pre-deposit while deciding his Stay Application, inspite of that it had simply waived the penalty of equal amount and the penalty under Rule : 209-A by its impugned order at Annexure : G. Therefore, the modification Application was submitted by the petitioner before the Appellate Tribunal, but unfortunately the same was dismissed as the Appellate Tribunal dismissed his main Appeal on the ground of non-compliance of pre-deposit order, without considering the orders passed in case of other companies. He also submitted that no extension, whatsoever, was granted by the Appellate Tribunal after it had passed the first order dated 19.2.2004 (Annexure : G). But, inspite of it the representative of the Department had misled the Appellate Tribunal by submitting that several extension were granted. To show his bonafide Shri Dave submitted that he is ready to pay 50 % of the pre-deposit amount of Rs.6,96,985/-, as directed by the Tribunal in its order

dated 19.2.2004 and on depositing the said amount within 6 weeks from today before the concerned Authority, the Appellate Tribunal be directed to hear his modification Application on merits. Having regard to the peculiar facts and circumstances of the case the learned Standing Counsel Shri Malkan has also no objection to this.

6. In view of the above, the petitioner is given 6 weeks time to deposit the pre-deposit 50 % amount of Rs.6,96,985 before the concerned Authority. Shri Dave submitted that he will deposit the round figure of Rs.3,50,000/-, out of Rs.9,69,985/-, as ordered by the Appellate Tribunal on 19.2.2004. On this, the impugned order dated 6.5.2004 (Annexure : J), passed by the learned Appellate Tribunal, is hereby quashed and set aside and the matter is remanded to the learned Appellate Tribunal to decide Modification Application No.702 of 2004, in accordance with law, provided the aforesaid amount of Rs.3,50,000/- is deposited within Six weeks from today with the concerned Authority.

If the petitioner deposits the amount of Rs.3,50,000/- within six weeks from today then the goods attached by the respondents be forthwith released in favour of the petitioner. It is also made clear that the learned Appellate Tribunal will be at liberty to pass fresh order of pre-deposit, in accordance with law, after extending an opportunity of hearing to both the sides.

Rule is made absolute accordingly with no order as to costs. Ad.interim relief granted earlier shall stands vacated, subject to aforesaid condition. Direct Service permitted.

(B.J.Shethna, J.)

Date : October 05, 2004

(Sharad D.Dave, J.)

sas